No. 22,395

IN THE

United States Court of Appeals

For the Ninth Circuit

SHAFFER C. TIM,

Appellant,

vs.

AMERICAN PRESIDENT LINES, LTD., a corporation,

Appellee.

Appeal from an Admiralty Decree of the United States District Court for the Northern District of California

Honorable Lloyd H. Burke, District Judge

APPELLANT'S CLOSING BRIEF

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I

APPELLEE AMERICAN PRESIDENT LINES, LTD., IS LIABLE FOR THE NEGLIGENT ACTS OF THE STEVEDORE'S EMPLOYEE PERFORMED WHILE IN THE COURSE AND SCOPE OF HIS EMPLOYMENT ON BOARD APPELLEE'S VESSEL.

This issue was previously set forth in Appellant's Opening Brief, pages 6 through 13.

Appellee, American President Lines, Ltd., appears to have set forth three responses which it set forth

as though unrelated but would appear to all be covered by appellant's above issue. Appellant will therefore respond to all three issues of Appellee, American President Lines, Ltd., which are set forth in its brief pages 10 through 24.

Appellee, American President Lines, Ltd., is attempting to reraise a long discarded defense. Appellee is attempting to reargue the defense of "fellow servant rule" which has clearly been held inappropriate in an action involving personal injuries to a seaman on board a vessel in navigable waters. (See *Mahnich v. Southern Steamship Company,* 321 U.S. 96, 64 S.Ct. 455.)

It is clear Appellee is attempting to do this in that throughout its arguments it continues to refer to the fact a fellow employee injured plaintiff, that if this was an injury between two longshoremen not on board the vessel that the plaintiff's recourse would be confined to compensation and that previous cases have recognized the difference in years past (but prior to *Mahnich* supra) of the defense of the "fellow servant rule".

It is important to keep in mind that this is an injury to a seaman on board a vessel in navigable waters. This is not an action involving injury to a longshoreman by another longshoreman and is not an injury which occurred shoreside or not on a vessel in navigable waters. However, it is submitted these differentials are not relevant to the case at bar as they also have already been decided by the Supreme Court of the United States as set forth in the authorities below.

In the case of *Mascuilli v. United States,* 387 U.S. 237, 358 F. 2d 133, the United States Supreme Court specifically held that the defendant ship was liable for injuries sustained by a longshoreman (in the case at bar the injuries were sustained by a seaman) when seaworthy equipment was negligently operated by a longshoreman. The court in that decision cited *Mahnich,* 321 U.S. 96, 64 S. Ct. 455 and *Crumady v. Joachim,* 358 U.S. 423, 79 S. Ct. 445.

Two weeks prior to the *Mascuilli* decision the Supreme Court in *Waldron v. Moore-McCormack Lines,* 386 U.S. 724, 87 S. Ct. 1410, arrived at the same conclusion and cited the same two cases (*Mahnich,* supra and *Crumady,* supra).

In the *Waldron,* supra, decision the court stated:

> "In *Mahnich v. Southern Steamship Company,* 321 U. S. 96, the court made it clear that availability of safe and sufficient gear on board does not prevent the actual use of defective gear from constituting unseaworthiness. For the test of unseaworthiness is to be applied 'when and where the work is to be done.'
>
> In *Crumady v. Joachim,* 358 U. S. 423, we further clarified the extent of seaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy. We emphatically stated the basis of our holding:
>
> 'Unseaworthiness extends not only to the vessel but to the crew.'
>
> For that proposition the court cited *Boudoin v. Lykes Brothers,* 348 U. S. 336, 75 S. Ct. 382, where

we said, 'We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other.'

When this court extended the shipowner's liability for unseaworthiness to longshoremen performing seamen's work, *Seas Shipping Company v. Sieracki,* 328 U. S. 85, 66 S. Ct. 872, either on board or on the pier, *Guitterez v. Waterman Steamship Corporation,* 373 U. S. 206, 83 S. Ct. 1185, either with the ships' gear or the stevedores' gear, *Alaska Steamship Company v. Petterson,* 347 U. S. 396, 74 S. Ct. 601, either as employees of an independent stevedore or as employees of a ship owner *pro hac vice, Reed v. The Yaka,* 373 U.S. 410, 83 S. Ct. 1349, we noted that 'the hazards of marine service, the helplessness of the man to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the humanitarian policy of the doctrine of unseaworthiness,' id., at 413, 83 S. Ct. at 1352, should prevent the shipowner from delegating, shifting or escaping his duty by using the men or gear of others to perform the ship's work. By the same token the shipowner should not be able to escape liability merely because he has used men rather than machines or physical equipment to perform that work."

In the *Waldron,* supra, decision, there were four dissenting justices who dissented on another ground. However, as to the issue presented to this court the four dissenting justices also recognized that that issue has clearly been resolved by the United States Supreme Court. The dissenting justices said in their first paragraph:

> "Under the prevailing cases in this court there can be no doubt that the negligent or improvident act of a competent officer, crewman, or longshoreman, can result in unseaworthiness if it rendered otherwise seaworthy equipment unfit for the purpose for which it is used. *Crumady v. The Joachim Hendrik Fisser,* 358 U.S. 423, 79 S. Ct. 445."

Since the *Waldron,* supra, decision resolved these issues when the issue was presented again two weeks later in the *Mascuilli,* supra, case the court did not render a written opinion but merely recited the same cases it had cited in the *Waldron,* supra, decision. The *Mascuilli* decision was merely reiterating the long held doctrine that the ship cannot avoid its nondelegable duty, an absolute duty to provide a safe and seaworthy vessel by arguing that it has delegated this duty to a longshoreman as in the case at bar. The Supreme Court held to the contrary and merely reiterated its position that the duty on the part of the shipowner is nondelegable in any manner.

What the Supreme Court has said in the above decisions is that "a seaman's incompetence constitutes unseaworthiness, *Boudoin v. Lykes Brothers,* 348 U. S. 336, 75 S. Ct. 382, the incompetence of a substitute for a seaman would no less constitute unseaworthiness. Similarly since the vessel can become unseaworthy when the stevedoring company puts aboard the defective equipment for use in the ship's work it can also become equally unseaworthy when the stevedore puts aboard defective longshoremen for this same work." (See *Smith v. Lauritzen,* 1962, 201 F. Supp.

663.) That is to say as Justice Douglas pointed out in the *Crumady,* supra, decision:

> "The winch in question was not defective, but the way it was used made it unsafe and dangerous for the work at hand."

The test therefore is, does the condition complained of make the vessel unsafe and dangerous for the work at hand. Or to say it another way as set forth in *Candiano v. Moore-McCormack Lines,* 251 F. Supp. 654 at 656, the practical test is "as it was actually used was the equipment unsafe and therefore unfit."

In no Supreme Court decision is there a holding that the warranty of seaworthiness is anything less than an absolute duty owing to all within the range of its humanitarian policy, one not satisfied by the exercise of due diligence, and inalienable, non-delegable responsibility, a species of liability without fault. The Supreme Court of the United States has enforced this protection with unwavering consistency and has sanctioned no departure from its absolute standard. It is elementary that the crucial consideration is the existence of an unseaworthy condition and not the method of creating said unseaworthy condition if the gear *as actually used*—not as intended to be used but as actually used—or the operation that was *actually performed* was unsafe, the injured longshoreman or seaman is entitled to recovery.

It is to be noted that Appellee, American President Lines, Ltd., at page 23 of its brief relies on the case of *Fenton v. A/S Glittre,* 1967 AMC 317. This decision was affirmed by the Court of Appeals for the Second

Circuit (see 370 F. 2d 146). However, it is this same Court of Appeals for the Second Circuit which subsequent to the *Fenton,* supra, decision stated in *Candiano v. Moore-McCormack Lines,* 382 F. 2d 961, that their previous decisions were incorrect in view of recent Supreme Court decisions. In so concluding the Court of Appeals for the Second Circuit stated in the *Candiano,* supra, decision,

> "The law in this field is now quite clear; any change must be by legislation or by Supreme Court decision."

The preceding discussion deals with the question of seaworthiness. The following discussion deals with the United States Supreme Court's further recognition that a shipping company is not going to avoid its responsibilities in the area of "negligence" on the basis that they have delegated this responsibility to a third party.

In this vein, the United States Supreme Court in *Hopson v. Texaco Incorporated,* 383 U. S. 262, 86 S. Ct. 765, stated:

> "The Jones Act incorporates the standards of the Federal Employers Liability Act as amended which renders an employer liable for the injuries negligently inflicted on its employees, by its officers, agents or employees. We stated in *Sinkler v. Missouri Pacific Railroad Company,* 356 U. S. 326, 78 S. Ct. 758, 2 Lawyer's Ed. 2d 799, that the later act was an avowed departure from the rules of the common law which, recognizing the cost of human injury and an inescapable expense of railroading, undertook to adjust that expense

> equitably between the worker and the carrier. In order to give an accommodating scope . . . to the word 'agents' we concluded that when (an) . . . employee's injury is caused in whole or in part by the fault of others performing under contract, operational activities of his employer, such others are agents of the employer within the meaning of Section 1 of F.E.L.A." (383 U. S. at pages 263-264.)

The court went on to say:

> "This is so because as we said in *Sinkler,* justice demands that one gives his labor to the furtherance of the enterprise should be assured that all combine their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be in danger." (See 383 U. S. page 264.)

Thus on the question of negligence the trial court in the case at bar came to the conclusion that a longshoreman working in the scope and course of his employment was not engaged in the "common endeavor" or that "operational activities" of the vessel. It is submitted that on the question of negligence this conclusion of the trial court is erroneous.

It is to be noted that Appellee, American President Lines, Ltd., attempts to distinguish the *Hopson* decision relative to the argument of negligence on the grounds that it, American President Lines, did not have a direct contractual relationship with the stevedoring company.

This argument is superfluous for the following reasons: (1) The trial court in its findings concluded, "There contracts were not regarded by the trial judge as having any significance insofar as the judgment reached was concerned." (See finding of fact number three.) (2) An Appellate Court of the United States has recognized that the stevedoring contracts with shipping companies give rise to third party contractual rights to injured employees on board a vessel in navigable waters. (*Sanderlin v. Old Dominion Stevedoring,* 385 F. 2d 79.) (3) The very essence of the *Hopson,* supra, decision was based on the premise that a shipowner had a nondelegable duty and should not be able to escape liability merely because the shipowner has used men rather than machines or physical equipment to perform the work it is obligated to perform.

It is submitted the facts presented to this court clearly substantiate the proposition that Appellee, American President Lines, is liable for the injuries sustained by the Appellant both on the grounds of the doctrine of unseaworthiness (*Waldron,* supra, *Mascuilli,* supra, *Candiano,* supra), and based on the doctrine of negligence (*Hopson,* supra, and *Sinkler,* supra).

II

THE PLAINTIFF, A SEAMAN IN THE EMPLOY OF DEFENDANT, WHILE ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT, HAS A RIGHT TO RELY ON THE STEVEDORE PERFORMING HIS DUTY WITH CARE AND IS, THEREFORE, NOT CONTRIBUTORILY NEGLIGENT.

The United States Supreme Court in *Hopson v. Texaco, Inc.,* 383 U. S. 262, 86 S. Ct. 765, stated:

> "This is so because as we said in *Sinkler* justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his work will not be in danger." (See 383 U.S. at page 264.)

Appellant, Shaffer C. Tim, in his opening brief, pages 13 through 19 sets forth authorities which substantiate the proposition that appellant was under no duty to exercise care to discover extraordinary dangers that may arise in the negligence of the shipowner or those for whose conduct the shipowner is responsible, but that the plaintiff may assume that the employer or his agent have exercised proper care for his safety until notified to the contrary.

The trial court found that "libelant assumed the operator of the gantry crane would not operate the crane while libelant was in a position of danger." (See Finding of Fact Number 14, lines 26 to 27.) And further found that "it was negligent of the gantry crane operator to operate the gantry crane while libelant was on the platform outside the operator's cab

under the circumstances described." (See Finding of Fact Number 21.)

Appellant in his opening brief sets forth the authorities that stand for the proposition that the appellant had the right to presume that the negligent employee of the defendant involved would do his duty and that under such circumstances the plaintiff could not be considered to have also been negligent for presuming that defendant's employee would do his duty.

It is reiterated that it is incongruous to hold that by exercising a right plaintiff can in any degree be negligent. The trial court concluded that plaintiff would not have placed himself in the position he did had he known the crane was going to operate and that plaintiff, in fact, never expected the crane operator to "be stupid enough to start the equipment." (See Court's expression in Reporter's Transcript, page 33, lines 16-22.)

III

THE TRIAL JUDGE AS A TRIER OF FACT CANNOT MAKE A FINDING ON DAMAGES AFTER HAVING ONCE FIRST CONCLUDED THERE IS NO LIABILITY ON THE PART OF DEFENDANT.

Appellant has set forth his arguments substantiating the above proposition in his opening brief, pages 19 through 24.

The appellee cites the case of *United States v. Woodbury,* 359 F. 2d 370, 379, as authority for its position.

It is submitted this case does not stand for appellee's proposition in that the question of damages in that case turned on a question of law. That is to say, if the trial court in the *Woodbury,* supra, decision was correct on its factual findings then as a matter of law the amount of damages was appropriate. This is not the situation as presented to this court.

In the *Woodbury* decision with regard to the question of damages on appeal the appellate court found, in that particular action that the trial court was correct in finding that no damages were recoverable. In that case there were four appeals and two motions before the court. On one of the appeals, the trial court had concluded that no damages were recoverable by the United States. The appellate court affirmed that decision.

In the case at bar, appellant contends that the trial court was in error as to the amount of damages it purportedly awarded because appellant in fact was not contributorily negligent. If in fact appellant is correct in this position, then it is submitted the trial court cannot bind the appellate court as to the amount of damages that should be awarded in the event the appellate court concludes that appellant is correct and that he was not in fact contributorily negligent.

In addition, even if this court should find that the trial court was correct on its conclusion of law with regard to whether appellant can be contributorily negligent when exercising a right recognized by law, then appellant further contends this court is deprived of its recognized appellate right to review the trial

court's findings of fact with which it substantiated its conclusions as to the amount of damages. Therefore the trial court is further in error in that it deprives this appellate court of its procedural rights to review the trial court's findings of facts in order to determine whether the trial court's conclusions as to the amount of damages were sustained by the evidence.

Dated, San Francisco, California,
May 31, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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